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# Combatting Narcoterrorism

Andrea Villa

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# Combatting Narcoterrorism

Andrea Villa\*

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## I. INTRODUCTION

In 2011, Manssor Arbabsiar along with several members of the Iran based Islamic Revolutionary Guards Corps Quds Force, planned to assassinate the Saudi Arabian ambassador to the United States.<sup>1</sup> They attempted to hire members of Los Zetas, a Mexican drug trafficking organization, to detonate a bomb at a restaurant in Washington, D.C.

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\* University of Miami, J.D. Candidate, May 2016. I would like to Professor Dragnich for all her help in bringing this article to fruition.

<sup>1</sup> JOHN ROLLINS & LIANA SUN WYLER, Cong. Research Serv. R41004, TERRORISM AND TRANSNATIONAL CRIME: FOREIGN POLICY ISSUES FOR CONGRESS 9 (June 11, 2013), <http://www.fas.org/sgp/crs/terror/R41004.pdf> (detailing the plot to assassinate the ambassador).

where the Ambassador would be dining.<sup>2</sup> From May to July 2011, Arbabsiar traveled to Mexico and met with a confidential informant of the United States Drug Enforcement Agency whom Arbabsiar believed to be a member of Los Zetas.<sup>3</sup> Arbabsiar inquired as to the informant's knowledge of explosives and explained that he was also interested, among other things, in attacking an embassy of Saudi Arabia.<sup>4</sup> Both men agreed that the assassination would be handled first and that they would later execute the other attacks.<sup>5</sup>

As part of the bombing plot, Arbabsiar planned to use the members of the Los Zetas cartel to bomb the Saudi Arabian and Israeli embassies in Washington.<sup>6</sup> The plot also included a side deal to ship several tons of opium from the Middle East to Mexico.<sup>7</sup> Arbabsiar was arrested on October 17, 2012, and pleaded guilty to three major felonies.<sup>8</sup> The DEA Administrator, Michele Leonhart, spoke out following Arbabsiar's arrest and warned that "the dangerous connection between drug trafficking and terrorism cannot be overstated."<sup>9</sup>

Former Attorney General, Eric Holder confirmed that the foiled plot was directed and approved by elements of the Iranian government and senior members of the Quds Force.<sup>10</sup> Iran's Quds Force is known to sponsor terrorist activity abroad, and the U.S. Treasury Department designated the organization to the Foreign Terrorist Organization list for providing material support to the Taliban and other terrorist organizations in 2007.<sup>11</sup> The 2011 incident involving Mansour Arbabsiar has not been the only time that the United States has seen Islamic organizations interacting with Mexican Drug Trafficking Organizations ("MDTOs").

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<sup>2</sup> Press Release, Dep't of Justice, Man Pleads Guilty in New York to Conspiring with Iranian Military Officials to Assassinate Saudi Arabian Ambassador to the United States (Oct. 17, 2012) *available at* <http://www.justice.gov/opa/pr/2012/October/12-ag-1251.html> (commenting on drug trafficking connection with assassination plot).

<sup>3</sup> *Id.*

<sup>4</sup> Press Release, Dep't of Justice, Two Men Charged in Alleged Plot to Assassinate Saudi Arabian Ambassador to the United States (Oct. 11, 2011) *available at* <http://www.justice.gov/opa/pr/two-men-charged-alleged-plot-assassinate-saudi-arabian-ambassador-united-states>.

<sup>5</sup> *Id.*

<sup>6</sup> Rollins, *supra* note 1, at 9.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Rollins, *supra* note 1.

<sup>10</sup> Benjamin Weiser, *Mansour Arbabsiar Sentenced for Plot to Kill Saudi Ambassador*, N.Y. TIMES, May 30, 2013, <http://www.nytimes.com/2013/05/31/nyregion/mansour-arbabsiar-sentenced-for-plot-to-kill-saudi-ambassador.html?r=0>.

<sup>11</sup> Dep't of Justice, *supra* note 4.

Although MDTOs and terrorist organizations operate differently, dangerous partnerships have begun to form between the two. The United Nations estimates that the revenue generated by the drug trade in the areas of Mexico, the U.S., and Canada is roughly \$147 billion annually.<sup>12</sup> Terrorist groups require a source of revenue to initiate and carry out their plans, and the billions of dollars generated by the illicit drug trade in Mexico has caught their attention. United States intelligence has reported that more than forty Foreign Terrorist Organizations<sup>13</sup> (“FTOs”) have links to the drug trade.<sup>14</sup> “Hezbollah, the Taliban, the Zetas, and a host of other transnational criminal groups play interlocking roles in a global network of mutually supporting commercial exchanges, by means of which they fund and replenish each other’s treasuries and armories.”<sup>15</sup>

The emerging relationship between Mexican drug trafficking organizations and Islamic terrorist organizations presents a major national security threat to the United States today. In response to this rapidly growing collaboration, Congressman Michael McCaul has introduced legislation seeking to designate six MDTOs as FTOs. According to McCaul, “[the] designation would allow the United States to limit cartels’ financial, property and travel interests, and to impose harsher punishment on anyone who provides material support to cartels.”<sup>16</sup> When classified as FTOs by the State Department, MDTOs would be subject to stricter penalties, and U.S. agencies would have more tools to limit their influence.<sup>17</sup>

This Note highlights the potential negative repercussions of the proposed FTO designation and instead suggests that the United States more effectively utilize existing narcotics trafficking regulations under

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<sup>12</sup> *Iran, Hezbollah and the Threat to the Homeland: Hearing Before the H. Comm. On Homeland Security* H. Comm. on Homeland Security, 112 Cong. 6 <https://homeland.house.gov/files/Testimony-Braun.pdf> (March 21, 2012) (Statement of Michael A. Braun DEA Chief of Operations).

<sup>13</sup> The Foreign Terrorist Organization list is a way in which the U.S. identifies foreign governments and organizations that engage in, support, or facilitate terrorism throughout the world. More information regarding the FTO list is available at: Eileen M. Decker, *The Enemies List: The Foreign Terrorist Organization List and its Role in Defining Terrorism* (March, 2014) (unpublished masters thesis, Naval Postgraduate School), <https://www.hsdl.org/?view&did=753810> [hereinafter “Decker”].

<sup>14</sup> Rollins, *supra* note 1, at 3.

<sup>15</sup> Joel Hernandez, *Terrorism, Drug Trafficking, and the Globalization of Supply*, 7 *PERSPECTIVES ON TERRORISM*, 41, 42 (August 2013), <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/281/568>.

<sup>16</sup> Press Release, Congressman Michael McCaul, McCaul Seeks to Classify Mexican Drug Cartels as Terrorists (Mar. 30, 2011), <https://mccaul.house.gov/media-center/press-releases/mccaul-seeks-to-classify-mexican-drug-cartels-as-terrorists> [hereinafter “Press Release, Congressman McCaul”].

<sup>17</sup> *Id.*

the Kingpin Act, and counterterrorism laws under Title 21 of the U.S. Code to combat the developing narco-terrorism threat. Part II of this Note explores the emerging relationship between MDTOs and FTOs and details specific collaboration plots that have raised red flags. Part III, analyzes the statutory criteria and legal requirements for an FTO designation, and tests the characteristics of MDTOs under the FTO designation statute. The note examines the potential legal implications of the designation, and argues that a designation should not occur. Part IV concludes the Note and suggests that the United States focus on existing narcotics trafficking regulations, under the Kingpin Act, and counterterrorism laws, under Title 21 of the U.S. Code, to fight the evolving narco-terrorism threat.

## II. THE EMERGING RELATIONSHIP BETWEEN MDTOS AND FTOs

The Department of Homeland Security has recently been forced to face the issue of how the United States should address the emerging relationship between MDTOs and FTOs. Traditionally, the Department has treated MDTOs similar to criminal organizations, and has mostly left the issue in the hands of law enforcement.<sup>18</sup> However, in recent years, MDTOs have been increasing their violence and now use tactics similar to those of FTOs.<sup>19</sup> From 2007 through 2013 there were more than 70,000 drug trafficking-related deaths in Mexico.<sup>20</sup> Of even more concern for the United States is the enhanced ability of FTOs to use their relationships and growing presence in the Western Hemisphere to partner with deadly MDTOs. Different Islamic actors looking for monetary and tactical support are approaching MDTOs, and this has led the Department of Homeland Security to reevaluate their strategy.<sup>21</sup> U.S. Representative Ileana Ros-Lehtinen, along with others, has made

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<sup>18</sup> JUNE S. BEITTEL, Cong. Research Serv. RS21049, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 2 (July 22, 2015), <https://www.fas.org/sgp/crs/row/R41576.pdf> [hereinafter "Beittel"].

<sup>19</sup> *Id.*

<sup>20</sup> MARK P. SULLIVAN & JUNE S. BEITTEL, Cong. Research Serv. RS21049, LATIN AMERICA: TERRORISM ISSUES 2 (Aug. 15, 2014), <https://www.fas.org/sgp/crs/terror/RS21049.pdf>.

<sup>21</sup> *See generally A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt*, 112 Cong. (Nov, 2012).

repeated calls to congress to update the United States' foreign policy in Mexico. In 2011 the Florida Republican said:<sup>22</sup>

We must stop looking at the drug cartels today solely from a law-enforcement perspective and consider designating these narco-trafficking members as foreign terrorist organizations and their leaders as specially designated nationals if they are providing material support and assistance to other foreign terrorist organizations and especially designated nationals and their state sponsors.<sup>23</sup>

It is no secret that the United States has struggled to combat the rising threat posed by MDTOs and has had trouble securing America's porous Southwest border.<sup>24</sup> Today, the violence perpetrated by MDTOs continues to grow and spill over into the United States. The influence of MDTOs is now felt in every region of the United States.<sup>25</sup> According to the National Drug Intelligence Center, MDTOs were operating in more than one thousand U.S. cities in every region of the country in 2009 and 2010.<sup>26</sup> However, a more violent threat to American citizens is the growing relationship between MDTOs and FTOs.<sup>27</sup> After the September 11, 2001 terrorist attacks, the United States has tightened security at airports and ports of entry, but the country's Southwest border continues to be a weak link in the chain.<sup>28</sup> Experts today are concerned that the Southwest border has now become the greatest threat of terrorist infiltration to the United States.<sup>29</sup>

Policymakers like McCaul are concerned with the diversification and evolution of both MDTOs and FTOs. "As financial markets have become globalized, so have opportunities for illicit groups to transact with each other."<sup>30</sup> FTOs have expanded, and are now seeking funding from illicit activities like drug-trafficking. The fear is that FTOs will use their presence in Latin America to establish a relationship with MDTOs. Today, experts that claim that this relationship has already been

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<sup>22</sup> Press Release, House Committee on Foreign Affairs, Ros-Lehtinen Opening Statement at Hearing on U.S. Security Threats in Western Hemisphere (Oct. 13, 2011), <http://archives.republicans.foreignaffairs.house.gov/news/story/?2033>.

<sup>23</sup> *Id.*

<sup>24</sup> See generally *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt.*, 112 Cong. (Nov, 2012).

<sup>25</sup> *Id.* at 16.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt.*, 112 Cong. 4 (Nov, 2012).

<sup>30</sup> Hernandez, *supra* note 15, at 41.

established, and that FTOs and MDTOs are already working together.<sup>31</sup> According to DEA special agent Derek Maltz:

Drugs and terrorism coexist across the globe in a marriage of mutual convenience. As state-sponsored terrorism has declined, these dangerous organizations have looked far and wide for resources and revenue to recruit, to corrupt, to train, and to strengthen their regime. Many drug-trafficking groups have stepped up to fill that revenue void.<sup>32</sup>

*a. Hezbollah's Presence in Mexico*

In 2010, the Obama Administration described Hezbollah as “the most technically capable terrorist group in the world.”<sup>33</sup> Hezbollah, a Shiite Islamist militia and political party, was designated as an FTO by the State Department on October 8, 1997.<sup>34</sup> The organization defines itself primarily as a resistance movement, and it viscerally opposes what it views as illegitimate United States and Israeli intervention in Lebanese regional affairs.<sup>35</sup> Until September 11, 2001, Hezbollah killed more Americans than any other terrorist group<sup>36</sup> and now runs one of the largest and more complex criminal networks in the world.<sup>37</sup>

Hezbollah first established its presence in Latin America in the mid-1980s, and has long benefitted from the loosely regulated tri-border area of Brazil, Paraguay, and Argentina.<sup>38</sup> Today, South America is home to the largest Lebanese population in the world,<sup>39</sup> and Hezbollah's reach extends beyond the tri-border area.<sup>40</sup> According to the Former Ambassador to the Organization of American States, Roger Noriega, “Hezbollah conspires with drug-trafficking networks in Mexico and

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<sup>31</sup> *Id.* at 47-50.

<sup>32</sup> *Id.* at 49.

<sup>33</sup> Celina B. Realuyo, *The Terror-Crime Nexus Hezbollah's Global Facilitators*, PRISM, 2014, at 117, 119, [http://cco.ndu.edu/Portals/96/Documents/prism/prism\\_5-1/The\\_Terror\\_Crime\\_Nexus.pdf](http://cco.ndu.edu/Portals/96/Documents/prism/prism_5-1/The_Terror_Crime_Nexus.pdf).

<sup>34</sup> Press Release, U.S. Dep't of State, Bureau of Counterterrorism, Foreign Terrorist Organizations (Feb. 20, 2016), <http://www.state.gov/j/ct/rls/other/des/123085.htm> [Hereinafter “Foreign Terrorist Organizations”].

<sup>35</sup> Realuyo, *supra* note 33, at 118.

<sup>36</sup> *Id.* at 117.

<sup>37</sup> *Id.* at 121-23.

<sup>38</sup> *Threat to the Homeland: Iran's Extending Influence in the Western Hemisphere: Written Testimony before the H. Comm. on Homeland Security* 113th Cong. 3 (July 9, 2013) (Written Testimony of Mathew Levitt, Director of Stein Program on Counterterrorism and Intelligence).

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.*

Central and South America as a means of raising and laundering funds, sharing tactics and ‘reaching out and touching’ U.S. territory.”<sup>41</sup>

The Mexican government has already arrested numerous individuals associated with Hezbollah for engaging in criminal activities in Mexico.<sup>42</sup> Mr. Derek S. Maltz of the DEA, confirmed the arrest of a Mexican national with ties to Lebanon for attempting to set up a Hezbollah network in Mexico.<sup>43</sup> Jameel Nasr, was a Hezbollah operative entrusted with forming a Hezbollah base in Latin America to carry out operations against Israeli and Western Targets.<sup>44</sup> In September 2012, Mexican authorities arrested three men suspected of operating a Hezbollah cell in Mexico. Among the arrested was Rafic Mohammad Labboun, a U.S. citizen born in Lebanon convicted for a credit card scheme that raised \$100,000 for Hezbollah.<sup>45</sup> Labboun’s partners were both Lebanese immigrants who were participating in financing activities in order to bail out incarcerated Hezbollah members in the United States.<sup>46</sup> These arrests arose obvious concerns involving Hezbollah’s attempt to solidify and strengthen its presence in Mexico.

Hezbollah has become well integrated in the area of transnational organized crime, and gains much of its profits from illicit enterprises such as drug trafficking.<sup>47</sup> The FTO has worked closely with the MDTO Los Zetas.<sup>48</sup> Ayman Joumaa, a Hezbollah financier and leader of an international drug trafficking and money laundering network, was charged by the United States Department of Justice for selling 85,000 kilograms of cocaine to Los Zetas from 2005 to 2007.<sup>49</sup> Joumaa and his

<sup>41</sup> *Hezbollah’s Strategic Shift: Hearing Before H. Comm. of Foreign Affairs Subcomm. on Terrorism, Non-Proliferation and Trade* 113th Cong. 3 (March 20, 2012) (Testimony of Roger F. Noriega, Ambassador), <http://docs.house.gov/meetings/FA/FA18/20130320/100534/HHRG-113-FA18-Wstate-NoriegaR-20130320.pdf>.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Narcoterrorism and the Long Reach of U.S. Law Enforcement, Part II: Hearing Before Subcomm. on Terrorism, Nonproliferation, and Trade*, 112th Cong. (2011) (Statement of Derek S. Maltz, Special Agent, DEA) <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg71265/html/CHRG-112hhrg71265.htm>

<sup>44</sup> JENNIFER L. HESTERMAN, *THE TERRORIST-CRIMINAL NEXUS* (CRC Press 2013).

<sup>45</sup> Noriega Testimony, *supra* note 41, at 4.

<sup>46</sup> *Threat to the Homeland: Iran’s Extending Influence in the Western Hemisphere: Written Testimony before the H. Comm. on Homeland Security* 113th Cong. 5-6 (July 9, 2013) (Written Testimony of Mathew Levitt, Director of Stein Program on Counterterrorism and Intelligence).

<sup>47</sup> Rollins, *supra* note 1, at 20.

<sup>48</sup> Press Release, United States Attorney’s Office, U.S. Charges Alleged Lebanese Drug Kingpin with Laundering Drug Proceeds for Mexican and Colombian Drug Cartels (Dec. 13, 2011), <http://www.justice.gov/archive/usao/vae/news/2011/12/20111213joumaanr.html>.

<sup>49</sup> Complaint at 3, *United States v. Joumaa*, No. 11-560 (E.D.Va. Nov 3, 2011).



organization paid fees to Hezbollah to facilitate the transportation and laundering of the drug trafficking proceeds.<sup>50</sup> By using Hezbollah couriers, Joumaa's organization was able to launder as much as \$200 million per month. "... [T]he deviously creative ways that terrorist organizations are funding themselves and moving their money . . . puts into stark relief the nexus between narcotics trafficking and terrorism."<sup>51</sup>

Joumma's arrest exposed the growing relationship between Hezbollah and MDTOs, and raised concerns over the possibility of Hezbollah using their growing relationship to exploit paths into the United States.<sup>52</sup> MDTOs collectively maintain control of drug and human smuggling routes across the United States – Mexico border,<sup>53</sup> and authorities worry about the potential exploitation of these routes by FTOs like Hezbollah. Department of Homeland Security Secretary, Janet Napolitano, claimed that terrorists have already crossed the Southwest border with the intent to harm the American people.<sup>54</sup> Not only could FTOs use these drug routes to smuggle supporters across the border, but they could use the routes to smuggle "... materials, including uranium, which can be safely assembled on U.S. soil into a weapon of mass destruction."<sup>55</sup>

### *b. Iran's Influence in Mexico*

Policymakers have become increasingly concerned with Iran's growing influence and activities in Latin America.<sup>56</sup> Collaboration between Iranian nationals and MDTOs was exemplified by the 2011 Iranian plot to assassinate the Saudi Ambassador to the United States.<sup>57</sup> The foiled plot raised many red flags, and left many governmental agencies wondering about the extent of relations between Iran and MDTOs. U.S. Representative Ileana Ros-Lehtinen said, "[t]his week's

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<sup>50</sup> John Cisar, *Narcoterrorism: How Drug Trafficking and Terrorism Intersect*, 1:2 J. OF HOMELAND AND NAT'L SEC. PERSPECTIVES 23, 27-28 (2014).

<sup>51</sup> Press Release, Drug Enforcement Administration, *DEA News: Civil Suit Exposes Lebanese Money Laundering Scheme for Hizballah* (Dec. 15, 2011), <http://www.dea.gov/pubs/pressrel/pr121511.html>.

<sup>52</sup> See generally *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and management*, 112 Cong. 2 (Nov, 2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> Sullivan, *supra* note 20, at 1.

<sup>57</sup> Robert W. Gallagher, Jr., *Note, Collaborative Consumption: Evaluating the Convergence Between Terrorism and Transnational Organized Crime and its Implications for the National Security of the United States*, 37 SUFFOLK TRANSNAT'L L. REV. 317, 332 (2014).

foiled plot contributed to the growing evidence of the potential links between these groups and the drug cartels . . . it seems that our sworn enemy Iran sees a potential kindred spirit in the drug cartels in Mexico.”<sup>58</sup>

In July 2006, *El Universal*, a Mexican newspaper, exposed intelligence from the U.S. Drug Enforcement Administration revealing that members of the MDTO Sinaloa Cartel were being sent to Iran for training.<sup>59</sup> The newspaper claimed that the MDTO’s members were being as snipers and in the use of explosives trained by the Iranian Revolutionary Guards.<sup>60</sup> The organization’s members were traveling from Mexico to Venezuela and then on to weekly flights to Tehran.<sup>61</sup> Congressman Michael McCaul confirmed that “[i]n 2008 the Sinaloa drug cartel was sending elite assassins to train on weapons and explosives with Islamic radicals in Iran.”<sup>62</sup> The *Universal* newspaper also claimed that many Iranian nationals who belong to Hezbollah managed to secure Mexican citizenship by marriages arranged by drug cartels in the country.<sup>63</sup> The newspaper’s findings raised concerns regarding the close connection between Iran and deadly MDTOs.

*b. Presence of Al-Qaeda Affiliates in Mexico*

In October 1999, al-Qaeda was designated as an FTO by the U.S. State Department.<sup>64</sup> Al-Qaeda receives most of its funding from rich donors and charities in Arab communities, and its decentralized cells and affiliates that are involved in criminal activity as away to raise money.<sup>65</sup> Ever since the September 11, 2001 terrorist attacks, law enforcement agencies have speculated about al-Qaeda’s interest in using Mexico as a gateway for entry into the United States. In May 2012, the Los Angeles

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<sup>58</sup> Ros-Lehtinen, *supra* note 22.

<sup>59</sup> *Threat to the Homeland: Iran’s Extending Influence in the Western Hemisphere: Written Testimony before the H. Comm. on Homeland Security* 113th Cong. 7 (July 9, 2013) (Written Testimony of Mathew Levitt, Director of Stein Program on Counterterrorism and Intelligence).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Press Release, Congressman Michael McCaul, Generals Testify of Drug Cartels’ National Security Threat, Need to Secure Border (Oct. 14, 2011), <https://mccaul.house.gov/media-center/press-releases/generals-testify-of-drug-cartels-national-security-threat-need-to-secure>.

<sup>63</sup> *Id.*

<sup>64</sup> JOHN ROLLINS & ROSEN, CONG. RESEARCH SERV., R41004, INTERNATIONAL TERRORISM AND TRANSNATIONAL CRIME: SECURITY THREATS, U.S. POLICY, AND CONSIDERATIONS FOR CONGRESS 27 (Jan. 5, 2011), <https://www.fas.org/sgp/crs/terror/R41004-2010.pdf>.

<sup>65</sup> *Id.*

Times reported that a raid on Osama Bin Laden's compound uncovered evidence that Osama Bin Laden was actively seeking to recruit anyone with a Mexican passport to conduct terrorist operations.<sup>66</sup> Bin Laden knew how easily Mexican nationals could cross the border and blend into American Society.<sup>67</sup> The Department of Homeland Security has since issued terror watches regarding possible illegal crossings into the United States by terrorist suspects and recruiters.<sup>68</sup> In 2010, a terror watch was issued in response to reports from Texan authorities who warned that members of al-Shabaab, an affiliate of al-Qaeda, were crossing the border illegally.<sup>69</sup>

MDTOs have demonstrated their ever-evolving capabilities with the many tunnels constructed to secure their drug trafficking routes. These tunnels are used to transport narcotics, people, and other contraband from Mexico into the United States. As of March 2011 there were 135 tunnels discovered by United States law enforcement agencies.<sup>70</sup> In one video, authenticated by U.S. counterterrorism officials, an al-Qaeda recruiter threatened to smuggle a biological weapon into the United States by using tunnels created by MDTOs.<sup>71</sup> In the video, Kuwait terrorist, Abdullah al-Nafisi said that the tunnels could be used to transport four pounds of anthrax in order to kill 330,000 Americans within a single hour.<sup>72</sup>

Another area of concern is the rapidly growing drug trafficking business of MDTOs. Recently, MDTOs have been expanding cocaine shipments into mainland Europe and are now using Africa as a

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<sup>66</sup> *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt*, 112 Cong. 3 (Nov, 2012).

<sup>67</sup> Brian Bennett, *Bin Laden Apparently Sought Operative with Valid Mexican Passport*, L. A. TIMES, May 2, 2012, [http://latimesblogs.latimes.com/world\\_now/2012/05/papers-bin-laden-sought-operative-to-cross-into-us-from-mexico.html](http://latimesblogs.latimes.com/world_now/2012/05/papers-bin-laden-sought-operative-to-cross-into-us-from-mexico.html).

<sup>68</sup> Press Release, Judiciary Committee, DHS Says Terrorists Illegally Crossing U.S.-Mexico Border (May 27, 2010) (on file at <http://judiciary.house.gov/index.cfm/press-releases?ID=1B4488C2-E90A-0624-0185-A99DFFBE45A8>).

<sup>69</sup> *Id.*

<sup>70</sup> Danny E. Hughes, *Violence Towards Police and Politicians in Mexico; Implications for California Policing?* 10 (March, 2012) (unpublished study) (On file with Command College, Fullerton Police Department), <http://lib.post.ca.gov/lib-documents/cc/Class50/50-Hughes.pdf>.

<sup>71</sup> *Al Qaeda Eyes Bio Attack From Mexico*, WASH. TIMES (June 3, 2009), <http://www.washingtontimes.com/news/2009/jun/03/al-qaeda-eyes-bio-attack-via-mexico-border/?page=1>.

<sup>72</sup> JOHN ROLLINS & LIANA SUN WYLER & SETH ROSEN, CONG. RESEARCH SERV., R41004, INTERNATIONAL TERRORISM AND TRANSNATIONAL CRIME: SECURITY THREATS, U.S. POLICY, AND CONSIDERATIONS FOR CONGRESS 10 & 40 (Jan. 5, 2010), <https://www.fas.org/spp/crs/terror/R41004-2010.pdf>.

smuggling route.<sup>73</sup> This new route comes with many concerns because it exposes MDTOs to al-Qaeda and their affiliates operating in Africa.<sup>74</sup> MDTOs are collaborating with al-Qaeda affiliates in the region to protect drug shipments through the Sahara.<sup>75</sup> In exchange for a fee, al-Qaeda's affiliates in North Africa engage in schemes that assist in moving cocaine from West Africa into Europe.<sup>76</sup> The former chief of DEA operations, Michael Braun, confirmed that groups like al-Qaeda and MDTOs are already doing business and will become operational allies in the future.<sup>77</sup>

### III. SHOULD MDTOS BE CLASSIFIED AS FTOs?

#### a. *Purpose of FTO Designation.*

The Foreign Terrorist Organization list is a way in which the United States identifies foreign organizations that are engaged in, support, or facilitate terrorism throughout the world.<sup>78</sup> When the list was first issued in 1997, it included 30 organizations and was designed to provide valuable tools for stopping terrorists. There are currently 57 organizations on the FTO list.<sup>79</sup> The "FTO list has unique importance not only because of the specific measures undertaken to thwart the activities of designated groups but also because of the symbolic public role it plays as a tool of U.S. counterterrorism policy."<sup>80</sup>

#### b. *Designating MDTOs as FTOs*

A majority report by the U.S. House Committee on Homeland Security entitled "*A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border*" explored the increasing presence of terrorist organizations in the region and their potential alliance with

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<sup>73</sup> *Id.* at 8.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 8.

<sup>76</sup> PAUL REXTON KAN, *CARTELS AT WAR: MEXICO'S DRUG FUELED VIOLENCE AND THE THREAT TO U.S. NATIONAL SECURITY* 85 (2012).

<sup>77</sup> STEPHEN L. MALLORY, *UNDERSTANDING ORGANIZED CRIME* 273 (2nd ed. 2012).

<sup>78</sup> Decker, *supra* note 13, at 1.

<sup>79</sup> Foreign Terrorist Organizations, *supra* note 34.

<sup>80</sup> AUDREY KURTH CRONIN, CONG. RESEARCH SERV., RL32120 "THE FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 5 (Oct. 21, 2003), <http://fas.org/irp/crs/RL32120.pdf> [hereinafter Cronin].

MDTOs.<sup>81</sup> The House Committee provided a clear and thorough explanation of the threats and included recommendations on how to best address them. One proposed recommendation that has gained traction is the recommendation to designate MDTOs as FTOs.<sup>82</sup> The reason that this recommendation has caught the attention of policymakers is the idea that MDTOs are no longer simply just a drug problem.<sup>83</sup> Many government officials believe that the diversification of the MDTOs and the potential expansion and collaboration with FTOs is too big of a threat to be left unanswered.

*c. Proposed Legislation: H.R. 1270 and H.R. 4303*

Congressman Michael McCaul of Texas, the Chairman of the House Committee on Homeland Security, introduced legislation seeking to specifically designate six MDTOs as FTOs.<sup>84</sup> The two bills introduced, H.R. 1270 and H.R. 4303, cite MDTO's use of brutal tactics of violence against United States citizens to protect and expand their drug trade and areas of operation.<sup>85</sup> A designation would allow federal charges to be brought against those who provide material support or resources to FTOs, permit deportation of FTO members, and require banks to freeze funds tied to FTOs.<sup>86</sup> McCaul defended the two bills by saying that, "Mexican drug cartels are terrorist organizations and this designation will provide the necessary tools to effectively advance the national security interests of both Mexico and the United States."<sup>87</sup>

*d. Statutory Criteria for an FTO Designation.*

The United States has come up with a concrete standard for determining whether an organization can be designated as an FTO. The 1996 Antiterrorism and Effective Death Penalty Act, which amends Section 219 of the Immigration and Nationality Act, sets out the legal

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<sup>81</sup> See generally *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt*, 112 Cong. (Nov, 2012).

<sup>82</sup> *Id.*

<sup>83</sup> Christopher J. Curran, Article, *Spillover: Evolving Threats and Converging Legal Authorities in the Fight Against Mexican Drug Cartels*, 6 HARV. NAT'L SEC. J. 344, 366 (2015).

<sup>84</sup> H.R. 1270, 112th Cong. (2011).

<sup>85</sup> See *Id.*; H.R. 4303, 112th Cong. (2012).

<sup>86</sup> Ben Jakovljevic, *Terror in Trading: Should the United States Classify Mexican Drug Trafficking Organizations as Terrorist Organizations?* 23 S. CAL. INTERDISC. L. J. 355, 362 (2014).

<sup>87</sup> Press Release Congressman Michael McCaul, *supra* note 16.

requirements for an FTO designation.<sup>88</sup> Pursuant to the Act, the Secretary of State is authorized to designate an organization as an FTO if three elements are satisfied: (1) The organization is foreign; (2) The organization engages in terrorist activity, terrorism, or retains the capability and intent to engage in terrorist activity or terrorism; and (3) The terrorist activity or terrorism threatens the security of United States citizens or the national security of the United States.<sup>89</sup>

The Secretary of State will review classified and open source information to decide if the organization meets the required criteria for designation. If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the FTO designation, he or she may add it to the FTO list by informing Congress and publishing a notice in the Federal Register.<sup>90</sup> Once an organization is placed on the FTO list, the organization is subject to various financial and immigration sanctions.<sup>91</sup>

*e. FTO designation as applied to MDTOs*

The Immigration and Nationality Act, as amended, contains three elements that must be satisfied in order for an FTO designation to take place.<sup>92</sup> The first element required for an FTO designation is that the organization be foreign.<sup>93</sup> Both H.R. 1270 and H.R.4303 propose to designate the following six MDTOs as FTOs: The Arellano Feliz Organization, The Los Zetas Cartel, The Beltran Leyva Organization, La Familia Michoacana, The Sinaloa Cartel, The Gulf Cartel/New Federation.<sup>94</sup> All of the six MDTOs proposed for designation by the two bills are based in Mexico, and they easily satisfy the foreign requirement.

The second element required for FTO designation is that “the organization engages in terrorist activity (as defined in Section 1182(a)(3)(B) of [Title 8] or terrorism (as defined in section 2656f(d)(2) of Title 22) or retains the capability and intent to engage in terrorist activity or terrorism.”<sup>95</sup> The FTO designation statute provides reference to two other statutes to decide whether the organization is engaging in “Terrorism” or “Terrorist Activity.”<sup>96</sup> Under the relevant statute, “Terrorism” is defined as “premeditated, politically motivated violence

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<sup>88</sup> Cronin, *supra* note 80, at 1.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 8 U.S.C. § 1189(a) (2013).

<sup>93</sup> *Id.*

<sup>94</sup> H.R. 1270, 112th Cong. (2011).

<sup>95</sup> 8 U.S.C. § 1189(a) (2013).

<sup>96</sup> *Id.*

perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>97</sup> In August 2010, President Calderon described the violence perpetrated by MDTOs as “a challenge to the state, an attempt to replace the state.”<sup>98</sup> During that time, there were 13 political assassinations, and over 40 journalists were murdered or disappeared.<sup>99</sup> Whether MDTOs are politically motivated is a heavily debated issue.<sup>100</sup> Regardless, the FTO designation statute provides a disjunctive test and the second element may still be satisfied without having to answer the question of whether MDTOs are politically motivated.<sup>101</sup>

The FTO designation statute<sup>102</sup> allows the second element to be satisfied if the organization engages in “Terrorist Activity” as defined under the relevant statute.<sup>103</sup> The “Terrorist Activity” definition under the relevant statute lacks a political motivation requirement.<sup>104</sup> It is defined as any unlawful activity which involves, among other things, “the seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.”<sup>105</sup> The definition also includes a violent attack upon an internationally protected person and even includes assassinations.<sup>106</sup> Based on this definition, the kidnappings and assassinations conducted by MDTOs qualify as “Terrorist Activity” under the statute. MDTOs are diversifying and they are no longer only trafficking illegal narcotics. Today, the tactics used by MDTO’s include kidnappings, beheadings, public hanging of corpses, killing innocent bystanders,<sup>107</sup> car bombs, torture, and assassinations of numerous journalists and government officials.<sup>108</sup> The surge in violence has been accompanied by an increase

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<sup>97</sup> 22 U.S.C. § 2656f(d)(2) (2013).

<sup>98</sup> H.R. 4303, 112th Cong. (2012).

<sup>99</sup> *Id.*

<sup>100</sup> Howard Campbell & Tobin Hansen, *Is Narco-Violence in Mexico Terrorism?*, BULL. OF LATIN AM. RES., Vol.33, (2013) <http://onlinelibrary.wiley.com/doi/10.1111/blar.12145/epdf>.

<sup>101</sup> Jakovljevic, *supra* note 86, at 377.

<sup>102</sup> 8 U.S.C. § 1189(a) (2013).

<sup>103</sup> 8 U.S.C. § 1182(a)(3)(B) (2013).

<sup>104</sup> 22 U.S.C. § 2656f(d)(2) (2013).

<sup>105</sup> 8 U.S.C. § 1182(a)(3)(B) (2013)

<sup>106</sup> *Id.*

<sup>107</sup> H.R. 4303, 112th Cong. (2012). The August 25, 2011, Casino Royale arson fire by MDTOs in Monterrey killed 52 innocent civilians. President Calderon responded to the event by saying “We are facing true terrorists . . . “

<sup>108</sup> Beittel, *supra* note 18, at 4.

in kidnapping for ransom and other crimes that surely fit the “Terrorist Activity” definition.<sup>109</sup>

Even if MDTO activity did not qualify as “Terrorist Activity” under the relevant statute, the second criterion of the FTO designation statute may also be satisfied if the organization “retains the capability and intent to engage in terrorist activity or terrorism.”<sup>110</sup> Experts claim that MDTOs have better weapons and armor than both Mexican and U.S. law enforcement.<sup>111</sup> Combined, MDTOs have over 100,000 foot soldiers, and have greatly upgraded their violence techniques.<sup>112</sup> The organizations now have access to military grade weaponry and homemade armored vehicles.<sup>113</sup> Dangerous MDTOs like Los Zetas continue to recruit former military members and even corrupt police officers to fight with them.<sup>114</sup> The “occasional use of car bombs, grenades, and rocket-propelled grenade launchers—such as the one used to bring down a Mexican army helicopter in May 2015 . . . continue to raise concerns that some [MDTOs] may be adopting . . . terrorist techniques”<sup>115</sup> The combination of actual violence already perpetrated by MDTOs and the vast potential for future violence are enough to satisfy the second element required for FTO designation.

Under the FTO designation statute, the third element that must be satisfied for an FTO designation is that “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”<sup>116</sup> Today, MDTOs are a direct threat to American lives. “Over 200 United States citizens have been killed in the drug war, either because they were in the cartels or were innocent bystanders.”<sup>117</sup> MDTOs also threaten the lives of American officials. For instance, assaults on border patrol agents increased from 729 in 2006 to 1,039 in 2011.<sup>118</sup> On February 15, 2011, the MDTO Los Zetas attacked and killed United States Immigration and Customs Enforcement agent Jamie Zapata, and wounded a second agent, Victor Avila.<sup>119</sup> “When Americans at home and abroad, including agents

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<sup>109</sup> *Id.*

<sup>110</sup> 8 U.S.C. § 1189(a)(B) (2013).

<sup>111</sup> Shawn Teresa Flanigan, *Terrorists Next Door? A Comparison of Mexican Drug Cartels and Middle Eastern Terrorist Organizations*, *TERRORISM AND POL.VIOLENCE J.*, 279, 285 (2012).

<sup>112</sup> Jakovljevic, *supra* note 86, at 358.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Beittel, *supra* note 18, at 4.

<sup>116</sup> 8 U.S.C. § 1189(a)(C) (2013).

<sup>117</sup> H.R. 43,114th Cong. (2015).

<sup>118</sup> H.R. 4303,114th Cong. (2012).

<sup>119</sup> *Id.*



assigned to protect United States borders and national security, are targeted, threatened, and attacked by such foreign entities, it threatens the safety and security of the United States and its people.”<sup>120</sup>

Accordingly, MDTOs could be designated as FTOs under the Immigration and Nationality Act. Although MDTOs meet all of the criteria required by the FTO designation statute, this does not mean that they should be designated as FTOs. The FTO designation statute provides a discretionary standard, and it is up to the Secretary of State to decide whether to designate an organization or not. All of the terrorist organizations on the FTO list have a history of violent acts that have killed civilians, but not all groups that kill civilians are automatically added to the list.<sup>121</sup> There are over 600 known terrorist groups in the world, and not all of them make the FTO list. There are a variety of non-statutory factors that influence the Secretary of State’s decision. Although the Secretary of State has never publicly identified any of the non-statutory factors that influence the FTO designation decision, a balancing of national security interests must take place.<sup>122</sup>

*f. Arguments for Designation of MDTOs as FTOs*

Policymakers like McCaul argue that an FTO designation is necessary to prevent MDTOs from collaborating with FTOs.<sup>123</sup> McCaul argues that a designation is essential because Mexico “. . . is in danger of becoming a failed state controlled by criminals. If this happens, Mexico could become a safe haven for terrorists who we know are attempting to enter the United States through our porous border.”<sup>124</sup> MDTOs are increasing their efforts to control the drug distribution networks, and the fear is that the violent methods used by Mexican gangs and the ability of these gangs to inconspicuously move people across the Southern border could be exploited by terrorists.<sup>125</sup> MDTOs and FTOs are both seeking to

<sup>120</sup> *Id.*

<sup>121</sup> Decker, *supra* note 13, at at 21.

<sup>122</sup> *Id.* (Discussing a series of non statutory factors that influence the FTO designation process). The factors include whether a group attacked Israel or allied nation of strategic interest to the United States, attacked the United States or its citizens, or is affiliated with al-Qaeda. *See id.*

<sup>123</sup> H. COMM. ON HOMELAND SECURITY SUBCOMMITTEE ON OVERSIGHT, INVESTIGATIONS, AND MANAGEMENT, *supra* note 21.

<sup>124</sup> *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels Hearing Before H. Subcomm. on Oversight, Investigations, and Management*, 112<sup>th</sup> Cong. 2 (2011) (statement of Rep. McCaul), <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72224/pdf/CHRG-112hhrg72224.pdf>.

<sup>125</sup> Brian M. Jenkins et al., *Identifying Enemies Among Us: Evolving Terrorist Threats and the Continuing Challenges of Domestic Intelligence Collection and Information Sharing*, 4 (Rand Nat’l Def. Res. Inst. conference proceeding series, 2014),

exploit the narcotics trade and both organizations are becoming increasingly difficult to distinguish. According to the former DEA operations chief:

These bad guys (MDTOs) are now routinely coming in very close contact with the likes of Hezbollah, Hamas, Al Qaeda, who are vying for the same money, the same turf and same dollars . . . And my point being is, if anyone thinks for a moment that Hezbollah and Qods Force, the masters at leveraging and exploiting existing illicit infrastructures globally, are not going to focus on our southwest border and use that as perhaps a spring board in attacking our country, then they just don't understand how the real underworld.<sup>126</sup>

Policymakers like McCaul are critics of the United States' current counterterrorism efforts and claim that current policies fail to look forward to future and developing threats.<sup>127</sup> These critics complain that the threats posed by MDTOs are being handled improperly because they are not being classified within the framework of national security.<sup>128</sup> The solution proposed is to classify MDTOs using the definitions of terrorism and designating them as FTOs.

*g. MDTOs Should not be Designated as FTOs.*

The United States should not pass legislation seeking to designate MDTOs as FTOs. In both of McCaul's proposals, H.R. 1270 and H.R. 4303, he fails to recognize legislation already in place and presents only one solution to a two-issue problem. He and other policymakers are grouping together two separate and distinct emerging threats in Mexico: the growth and expansion of MDTOs and the possibility of MDTO members aiding FTOs. The mischaracterization of the threats has led policymakers to believe that a single solution (designating MDTOs as FTOs) is appropriate.

A designation of MDTOs as FTOs could lead to over-enforcement and abuse of the discretionary powers granted to officials by an FTO designation. There are already laws in place to deal with the issues presented in Mexico. MDTOs are already being sanctioned under the Kingpin Act, and MDTO members can also be prosecuted under federal terrorist provisions under Title 21 of the U.S. Code for aiding terrorist organizations. Consequently, an FTO designation would cause an

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<http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA592095> [hereinafter "Jenkins"].

<sup>126</sup> *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt*, 112 Cong. 14 (Nov, 2012).

<sup>127</sup> Jenkins, *supra* note 125, at 7.

<sup>128</sup> *Id.*

unnecessary overexpansion of law enforcement powers. Proponents of the designation argue that more government agency tools are helpful.<sup>129</sup> However, policymakers should be careful not to over-expand the government agency toolbox. "If history has taught anything, it is that law enforcement agencies will use the tools they are given, even when those actions infringe civil liberties or belie wise policy."<sup>130</sup>

Both domestic and international law provide the United States with a surplus of options to deal with terrorists, specifically the option to use of force.<sup>131</sup> A designation of MDTOs as FTOs could provide the United States with justification to use force against the MDTOs, and this could have devastating implications in Mexico. "The speed of transformation of U.S. government agencies into paramilitary institutions would likely be accelerated by an FTO designation."<sup>132</sup> Law enforcement agencies use the tools that the law provides in order to pursue the targets that the designation assigns.<sup>133</sup> Today, drones are already flying over Mexican airspace on a variety of surveillance missions.<sup>134</sup> "Given that some of these drone surveillance missions already navigate into Mexico, it is not hard to imagine these same drones being fitted with weaponry to take out MDTO kingpins . . ."<sup>135</sup>

An FTO designation of MDTOs would also negatively impact Fourth Amendment protections.<sup>136</sup> Police and other law enforcement officials would potentially be able to conduct suspicionless searches and enjoy the same broad discretion that many border officials possess.<sup>137</sup> Although the threat of these suspicionless searches would likely apply across all demographics, it would most likely have a discriminatory impact on Mexican nationals.<sup>138</sup> "The presumption would either be that they have

<sup>129</sup> Press Release, Congressman Michael McCaul, *supra* note 16.

<sup>130</sup> Jakovljevic, *supra* note 86, at 368.

<sup>131</sup> Aaron M. Munoz, Silver, *Secret Drug Wars, & Selfies: The United States' Justification for the Use of Force Against the Mexican Drug Cartels*, 41 W. ST. U. L. REV. 643, 654 (2014).

<sup>132</sup> Jakovljevic, *supra* note 86, at 369.

<sup>133</sup> *Id.* at 368.

<sup>134</sup> Ginger Thompson & Mark Mazzetti, *U.S. Drones Fight Mexican Drug Trade*, N.Y. TIMES, March 15, 2011, [http://www.nytimes.com/2011/03/16/world/americas/16drug.html?\\_r=0](http://www.nytimes.com/2011/03/16/world/americas/16drug.html?_r=0).

<sup>135</sup> Jakovljevic, *supra* note 86, at 393.

<sup>136</sup> Jakovljevic, *supra* note 86, at 395; *see also generally* Ric Simmon, Article, *Searching for Terrorists: Why Public Safety is Not a Special Need*, DUKE L. J. 2010 (discussing justified antiterrorism suspicionless searches).

<sup>137</sup> Jakovljevic, *supra* note 86, at 396; *see also generally*, *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (upholding an suspicionless search on a ferry in a terrorism case).

<sup>138</sup> Jakovljevic, *supra* note 86, at 396.

direct ties to an MDTO or are indirectly connected via a street gang with ties to an MDTO.”<sup>139</sup>

Labeling MDTOs as terrorists could put a strain on relations between the United States and Mexico because the Mexican government has not labeled MDTOs as terrorist groups.<sup>140</sup> “If the United States labeled [MDTOs] as terrorists without an agreement from Mexico, it would represent a step beyond where the Mexican Government may be willing to go.”<sup>141</sup> The Deputy Assistant Secretary of the Bureau of Internal Narcotics Law Enforcement Affairs, Brian A. Nichols, confirmed that an FTO designation would have profound political implications, and would require support from all Mexican counterparts.<sup>142</sup>

Finally, designating MDTOs as FTOs could harm many American citizens that are consumers of MDTO’s products. Drug dealers and drug users in the United States would be exposed to prosecution under the FTO material support statutes.<sup>143</sup> Simply put, a designation would mean that almost all drug crimes would be transformed into terrorist crimes. Mexico’s Ambassador to the United States, Arturo Sarukhan, commented on the proposal to label MDTOs as FTOs with the following statement:

Misunderstanding the challenge we face leads to wrong policies and bad policy making. If you label these organizations as terrorists, you will have to start calling drug consumers in the U.S. ‘financiers of terrorist organizations’ and gun dealers ‘providers of material support to terrorists.’ Otherwise, you really sound as if you want to have your cake and eat it too.<sup>144</sup>

#### IV. SUGGESTIONS

##### *a. Correctly Defining the Threat.*

There are currently two separate national security threats emerging in Mexico. An effective solution requires an acknowledgement of the two distinct threats, and a comprehensive plan that seeks to address both of

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<sup>139</sup> *See Id.*

<sup>140</sup> Kan, *supra* note 76, at 138.

<sup>141</sup> *Id.*

<sup>142</sup> *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before H. Subcomm. on Oversight, Investigations, and Management*, 112<sup>th</sup> Cong. 49 (2011) (Statement of Brian Nichols), <http://www.danielhudsondefense.com/reports/DHS-war-against-drug-cartels.pdf>

<sup>143</sup> Carrie F. Cordero, *Breaking the Mexican Cartels: a Key Homeland Security Challenge for the Next Four Years*, 81 UMKC L. REV. 286, 308 (2012).

<sup>144</sup> Hesterman, *supra* note 44, at 159.

them. The first emerging threat, is the growth and expansion of MDTOs. Today, MDTOs “operate nearly seamlessly across borders in order to facilitate their operations in the most efficient manner possible.”<sup>145</sup> MDTO’s increased use of brutal tactics endanger the lives of Mexican nationals and American citizens, and contribute to the growing instability of Mexico and the United States’ Southwest border.<sup>146</sup> American lawmakers have acknowledged that the growth of MDTOs is now a direct threat to the national security of the United States.<sup>147</sup> The solution to this threat is not to enact new legislation, but to attack MDTO finances under the Kingpin Act. Blocking the finances of MDTOs will help United States security forces disrupt and dismantle these deadly organizations.

The second emerging national security threat in Mexico is the possibility of MDTO members providing support to FTOs. The globalization of the financial markets has provided MDTOs and FTOs opportunities to transact with one another.<sup>148</sup> Today, there are policymakers who claim that MDTOs and FTOs have formed a strategic alliance and work closely together.<sup>149</sup> While a strategic alliance is conceivable, there is no real evidence that it has actually been achieved.<sup>150</sup> “Although illicit markets have certainly become a point of contact for otherwise vastly different criminal group—one where political terrorism, theocratic ultra-nationalism, and narco-insurgency fund and equip each other—commerce and imitation do not make amalgamation.”<sup>151</sup> A potential transactional relationship between MDTOs and FTOs does not equate to a strategic alliance.<sup>152</sup> Strategic alliance or not, however, the possibility of a transactional relationship between MDTOs and FTOs warrants attention.<sup>153</sup> Accordingly, in order to prevent any transactional relationship from forming, and to ensure that MDTOs do not support FTOs, the United States needs to better enforce existing counterterrorism laws under Title 21 of the U.S. Code.

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<sup>145</sup> Gallagher, *supra* note 57, at 327.

<sup>146</sup> Curran, *supra* note 83, at 346-47.

<sup>147</sup> Gallagher, *supra* note 57, at 328.

<sup>148</sup> Hernandez, *supra* note 15, at 41.

<sup>149</sup> Lieutenant Colonel John F. Nolden, Mexican Drug Cartels and al Qaeda: Credible Link or Impracticable Alliance? 3 (Sept. 10, 2011) (Unpublished, Naval War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a555399.pdf>.

<sup>150</sup> Hernandez, *supra* note 15, at 52.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>97</sup> In August 2010, President Calderon described the violence perpetrated by MDTOs as “a challenge to the state, an attempt to replace the state.”<sup>98</sup> During that time, there were 13 political assassinations, and over 40 journalists were murdered or disappeared.<sup>99</sup> Whether MDTOs are politically motivated is a heavily debated issue.<sup>100</sup> Regardless, the FTO designation statute provides a disjunctive test and the second element may still be satisfied without having to answer the question of whether MDTOs are politically motivated.<sup>101</sup>

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<sup>97</sup> 22 U.S.C. § 2656f(d)(2) (2013).

<sup>98</sup> H.R. 4303, 112th Cong. (2012).

<sup>99</sup> *Id.*

<sup>100</sup> Howard Campbell & Tobin Hansen, *Is Narco-Violence in Mexico Terrorism?*, BULL. OF LATIN AM. RES., Vol.33, (2013) <http://onlinelibrary.wiley.com/doi/10.1111/blar.12145/epdf>.

<sup>101</sup> Jakovljevic, *supra* note 86, at 377.

<sup>102</sup> 8 U.S.C. § 1189(a) (2013).

<sup>103</sup> 8 U.S.C. § 1182(a)(3)(B) (2013).

<sup>104</sup> 22 U.S.C. § 2656f(d)(2) (2013).

<sup>105</sup> 8 U.S.C. § 1182(a)(3)(B) (2013)

<sup>106</sup> *Id.*

<sup>107</sup> H.R. 4303, 112th Cong. (2012). The August 25, 2011, Casino Royale arson fire by MDTOs in Monterrey killed 52 innocent civilians. President Calderon responded to the event by saying “We are facing true terrorists . . . .”

<sup>108</sup> Beittel, *supra* note 18, at 4.

them. The first emerging threat, is the growth and expansion of MDTOs. Today, MDTOs “operate nearly seamlessly across borders in order to facilitate their operations in the most efficient manner possible.”<sup>145</sup> MDTO’s increased use of brutal tactics endanger the lives of Mexican nationals and American citizens, and contribute to the growing instability of Mexico and the United States’ Southwest border.<sup>146</sup> American lawmakers have acknowledged that the growth of MDTOs is now a direct threat to the national security of the United States.<sup>147</sup> The solution to this threat is not to enact new legislation, but to attack MDTO finances under the Kingpin Act. Blocking the finances of MDTOs will help United States security forces disrupt and dismantle these deadly organizations.

The second emerging national security threat in Mexico is the possibility of MDTO members providing support to FTOs. The globalization of the financial markets has provided MDTOs and FTOs opportunities to transact with one another.<sup>148</sup> Today, there are policymakers who claim that MDTOs and FTOs have formed a strategic alliance and work closely together.<sup>149</sup> While a strategic alliance is conceivable, there is no real evidence that it has actually been achieved.<sup>150</sup> “Although illicit markets have certainly become a point of contact for otherwise vastly different criminal group—one where political terrorism, theocratic ultra-nationalism, and narco-insurgency fund and equip each other—commerce and imitation do not make amalgamation.”<sup>151</sup> A potential transactional relationship between MDTOs and FTOs does not equate to a strategic alliance.<sup>152</sup> Strategic alliance or not, however, the possibility of a transactional relationship between MDTOs and FTOs warrants attention.<sup>153</sup> Accordingly, in order to prevent any transactional relationship from forming, and to ensure that MDTOs do not support FTOs, the United States needs to better enforce existing counterterrorism laws under Title 21 of the U.S. Code.

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<sup>145</sup> Gallagher, *supra* note 57, at 327.

<sup>146</sup> Curran, *supra* note 83, at 346-47.

<sup>147</sup> Gallagher, *supra* note 57, at 328.

<sup>148</sup> Hernandez, *supra* note 15, at 41.

<sup>149</sup> Lieutenant Colonel John F. Nolden, Mexican Drug Cartels and al Qaeda: Credible Link or Impracticable Alliance? 3 (Sept. 10, 2011) (Unpublished, Naval War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a555399.pdf>.

<sup>150</sup> Hernandez, *supra* note 15, at 52.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

*b. The Kingpin Act*

Policymakers like McCaul are right to worry about a potential threat, but wrong to seek to implement new legislation,<sup>154</sup> instead of effectively using existing laws, to address it. McCaul introduced legislation seeking to classify MDTOs as FTOs as a way for the United State's to limit MDTO's financial and property interests.<sup>155</sup> Although an FTO designation does impose substantial sanctions, the proposal fails to consider the financial sanctions that are already in place by the Treasury Department for drug trafficking under the Foreign Narcotics Kingpin Designation Act. The six MDTOs proposed for FTO designation by H.R. 1270 and H.R. 4303, are already being heavily sanctioned under the Kingpin Designation Act.<sup>156</sup>

On December 3, 1999, the President signed the Foreign Narcotics Kingpin Designation Act in order to apply economic and other financial sanctions to foreign narcotics traffickers and their organizations worldwide.<sup>157</sup> The Act is administered by the Department of the Treasury's Office of Foreign Assets Control.<sup>158</sup> Pursuant to the Act, the President, after consulting with various federal agencies, is required to submit to Congress an annual list identifying significant foreign narcotics traffickers.<sup>159</sup> The Kingpin Act also applies to foreign persons who are determined to be:

- (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person named pursuant to the Kingpin Act;
- (2) owned, controlled, directed by, or acting for or on behalf of, a person named pursuant to the Kingpin Act;
- or
- (3) playing a significant role in international narcotics trafficking.<sup>160</sup>

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<sup>154</sup> See H.R. 1270, 112th Cong. (2011); see also H.R. 4303, 112th Cong. (2012).

<sup>155</sup> Press Release, Congressman McCaul *supra* note 16.

<sup>156</sup> OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREASURY, DESIGNATIONS PURSUANT TO THE FOREIGN NARCOTICS KINGPIN DESIGNATION ACT, Jan. 7, 2016, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/narco\\_designations\\_kingpin.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/narco_designations_kingpin.pdf).

<sup>157</sup> OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREASURY, NARCOTICS SANCTIONS PROGRAM, July 18, 2014, <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf>.

<sup>158</sup> *Id.*

<sup>159</sup> 21 U.S.C. §§ 1901-1908 (1999). 8 U.S.C § 1182 (2013).

<sup>160</sup> *Id.*



in kidnapping for ransom and other crimes that surely fit the “Terrorist Activity” definition.<sup>109</sup>

Even if MDTO activity did not qualify as “Terrorist Activity” under the relevant statute, the second criterion of the FTO designation statute may also be satisfied if the organization “retains the capability and intent to engage in terrorist activity or terrorism.”<sup>110</sup> Experts claim that MDTOs have better weapons and armor than both Mexican and U.S. law enforcement.<sup>111</sup> Combined, MDTOs have over 100,000 foot soldiers, and have greatly upgraded their violence techniques.<sup>112</sup> The organizations now have access to military grade weaponry and homemade armored vehicles.<sup>113</sup> Dangerous MDTOs like Los Zetas continue to recruit former military members and even corrupt police officers to fight with them.<sup>114</sup> The “occasional use of car bombs, grenades, and rocket-propelled grenade launchers—such as the one used to bring down a Mexican army helicopter in May 2015 . . . continue to raise concerns that some [MDTOs] may be adopting . . . terrorist techniques”<sup>115</sup> The combination of actual violence already perpetrated by MDTOs and the vast potential for future violence are enough to satisfy the second element required for FTO designation.

Under the FTO designation statute, the third element that must be satisfied for an FTO designation is that “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”<sup>116</sup> Today, MDTOs are a direct threat to American lives. “Over 200 United States citizens have been killed in the drug war, either because they were in the cartels or were innocent bystanders.”<sup>117</sup> MDTOs also threaten the lives of American officials. For instance, assaults on border patrol agents increased from 729 in 2006 to 1,039 in 2011.<sup>118</sup> On February 15, 2011, the MDTO Los Zetas attacked and killed United States Immigration and Customs Enforcement agent Jamie Zapata, and wounded a second agent, Victor Avila.<sup>119</sup> “When Americans at home and abroad, including agents

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<sup>109</sup> *Id.*

<sup>110</sup> 8 U.S.C. § 1189(a)(B) (2013).

<sup>111</sup> Shawn Teresa Flanigan, *Terrorists Next Door? A Comparison of Mexican Drug Cartels and Middle Eastern Terrorist Organizations*, *TERRORISM AND POL.VIOLENCE J.*, 279, 285 (2012).

<sup>112</sup> Jakovljevic, *supra* note 86, at 358.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Beittel, *supra* note 18, at 4.

<sup>116</sup> 8 U.S.C. § 1189(a)(C) (2013).

<sup>117</sup> H.R. 43,114th Cong. (2015).

<sup>118</sup> H.R. 4303,114th Cong. (2012).

<sup>119</sup> *Id.*

assigned to protect United States borders and national security, are targeted, threatened, and attacked by such foreign entities, it threatens the safety and security of the United States and its people.”<sup>120</sup>

Accordingly, MDTOs could be designated as FTOs under the Immigration and Nationality Act. Although MDTOs meet all of the criteria required by the FTO designation statute, this does not mean that they should be designated as FTOs. The FTO designation statute provides a discretionary standard, and it is up to the Secretary of State to decide whether to designate an organization or not. All of the terrorist organizations on the FTO list have a history of violent acts that have killed civilians, but not all groups that kill civilians are automatically added to the list.<sup>121</sup> There are over 600 known terrorist groups in the world, and not all of them make the FTO list. There are a variety of non-statutory factors that influence the Secretary of State’s decision. Although the Secretary of State has never publicly identified any of the non-statutory factors that influence the FTO designation decision, a balancing of national security interests must take place.<sup>122</sup>

*f. Arguments for Designation of MDTOs as FTOs*

Policymakers like McCaul argue that an FTO designation is necessary to prevent MDTOs from collaborating with FTOs.<sup>123</sup> McCaul argues that a designation is essential because Mexico “. . . is in danger of becoming a failed state controlled by criminals. If this happens, Mexico could become a safe haven for terrorists who we know are attempting to enter the United States through our porous border.”<sup>124</sup> MDTOs are increasing their efforts to control the drug distribution networks, and the fear is that the violent methods used by Mexican gangs and the ability of these gangs to inconspicuously move people across the Southern border could be exploited by terrorists.<sup>125</sup> MDTOs and FTOs are both seeking to

<sup>120</sup> *Id.*

<sup>121</sup> Decker, *supra* note 13, at at 21.

<sup>122</sup> *Id.* (Discussing a series of non statutory factors that influence the FTO designation process). The factors include whether a group attacked Israel or allied nation of strategic interest to the United States, attacked the United States or its citizens, or is affiliated with al-Qaeda. *See id.*

<sup>123</sup> H. COMM. ON HOMELAND SECURITY SUBCOMMITTEE ON OVERSIGHT, INVESTIGATIONS, AND MANAGEMENT, *supra* note 21.

<sup>124</sup> *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels Hearing Before H. Subcomm. on Oversight, Investigations, and Management*, 112<sup>th</sup> Cong. 2 (2011) (statement of Rep. McCaul), <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72224/pdf/CHRG-112hhrg72224.pdf>.

<sup>125</sup> Brian M. Jenkins et al., *Identifying Enemies Among Us: Evolving Terrorist Threats and the Continuing Challenges of Domestic Intelligence Collection and Information Sharing*, 4 (Rand Nat’l Def. Res. Inst. conference proceeding series, 2014),

exploit the narcotics trade and both organizations are becoming increasingly difficult to distinguish. According to the former DEA operations chief:

These bad guys (MDTOs) are now routinely coming in very close contact with the likes of Hezbollah, Hamas, Al Qaeda, who are vying for the same money, the same turf and same dollars . . . And my point being is, if anyone thinks for a moment that Hezbollah and Qods Force, the masters at leveraging and exploiting existing illicit infrastructures globally, are not going to focus on our southwest border and use that as perhaps a spring board in attacking our country, then they just don't understand how the real underworld.<sup>126</sup>

Policymakers like McCaul are critics of the United States' current counterterrorism efforts and claim that current policies fail to look forward to future and developing threats.<sup>127</sup> These critics complain that the threats posed by MDTOs are being handled improperly because they are not being classified within the framework of national security.<sup>128</sup> The solution proposed is to classify MDTOs using the definitions of terrorism and designating them as FTOs.

*g. MDTOs Should not be Designated as FTOs.*

The United States should not pass legislation seeking to designate MDTOs as FTOs. In both of McCaul's proposals, H.R. 1270 and H.R. 4303, he fails to recognize legislation already in place and presents only one solution to a two-issue problem. He and other policymakers are grouping together two separate and distinct emerging threats in Mexico: the growth and expansion of MDTOs and the possibility of MDTO members aiding FTOs. The mischaracterization of the threats has led policymakers to believe that a single solution (designating MDTOs as FTOs) is appropriate.

A designation of MDTOs as FTOs could lead to over-enforcement and abuse of the discretionary powers granted to officials by an FTO designation. There are already laws in place to deal with the issues presented in Mexico. MDTOs are already being sanctioned under the Kingpin Act, and MDTO members can also be prosecuted under federal terrorist provisions under Title 21 of the U.S. Code for aiding terrorist organizations. Consequently, an FTO designation would cause an

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<http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA592095> [hereinafter "Jenkins"].

<sup>126</sup> *A Line in the Sand: Countering Crime, Violence and Terror at the Southwest Border: Hearing before the Subcomm. on oversight, investigations and mgmt*, 112 Cong. 14 (Nov, 2012).

<sup>127</sup> Jenkins, *supra* note 125, at 7.

<sup>128</sup> *Id.*

unnecessary overexpansion of law enforcement powers. Proponents of the designation argue that more government agency tools are helpful.<sup>129</sup> However, policymakers should be careful not to over-expand the government agency toolbox. "If history has taught anything, it is that law enforcement agencies will use the tools they are given, even when those actions infringe civil liberties or belie wise policy."<sup>130</sup>

Both domestic and international law provide the United States with a surplus of options to deal with terrorists, specifically the option to use of force.<sup>131</sup> A designation of MDTOs as FTOs could provide the United States with justification to use force against the MDTOs, and this could have devastating implications in Mexico. "The speed of transformation of U.S. government agencies into paramilitary institutions would likely be accelerated by an FTO designation."<sup>132</sup> Law enforcement agencies use the tools that the law provides in order to pursue the targets that the designation assigns.<sup>133</sup> Today, drones are already flying over Mexican airspace on a variety of surveillance missions.<sup>134</sup> "Given that some of these drone surveillance missions already navigate into Mexico, it is not hard to imagine these same drones being fitted with weaponry to take out MDTO kingpins . . ." <sup>135</sup>

An FTO designation of MDTOs would also negatively impact Fourth Amendment protections.<sup>136</sup> Police and other law enforcement officials would potentially be able to conduct suspicionless searches and enjoy the same broad discretion that many border officials possess.<sup>137</sup> Although the threat of these suspicionless searches would likely apply across all demographics, it would most likely have a discriminatory impact on Mexican nationals.<sup>138</sup> "The presumption would either be that they have

<sup>129</sup> Press Release, Congressman Michael McCaul, *supra* note 16.

<sup>130</sup> Jakovljevic, *supra* note 86, at 368.

<sup>131</sup> Aaron M. Munoz, Silver, *Secret Drug Wars, & Selfies: The United States' Justification for the Use of Force Against the Mexican Drug Cartels*, 41 W. ST. U. L. REV. 643, 654 (2014).

<sup>132</sup> Jakovljevic, *supra* note 86, at 369.

<sup>133</sup> *Id.* at 368.

<sup>134</sup> Ginger Thompson & Mark Mazzetti, *U.S. Drones Fight Mexican Drug Trade*, N.Y. TIMES, March 15, 2011, [http://www.nytimes.com/2011/03/16/world/americas/16drug.html?\\_r=0](http://www.nytimes.com/2011/03/16/world/americas/16drug.html?_r=0).

<sup>135</sup> Jakovljevic, *supra* note 86, at 393.

<sup>136</sup> Jakovljevic, *supra* note 86, at 395; *see also generally* Ric Simmon, Article, *Searching for Terrorists: Why Public Safety is Not a Special Need*, DUKE L. J. 2010 (discussing justified antiterrorism suspicionless searches).

<sup>137</sup> Jakovljevic, *supra* note 86, at 396; *see also generally*, *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (upholding an suspicionless search on a ferry in a terrorism case).

<sup>138</sup> Jakovljevic, *supra* note 86, at 396.

direct ties to an MDTO or are indirectly connected via a street gang with ties to an MDTO.”<sup>139</sup>

Labeling MDTOs as terrorists could put a strain on relations between the United States and Mexico because the Mexican government has not labeled MDTOs as terrorist groups.<sup>140</sup> “If the United States labeled [MDTOs] as terrorists without an agreement from Mexico, it would represent a step beyond where the Mexican Government may be willing to go.”<sup>141</sup> The Deputy Assistant Secretary of the Bureau of Internal Narcotics Law Enforcement Affairs, Brian A. Nichols, confirmed that an FTO designation would have profound political implications, and would require support from all Mexican counterparts.<sup>142</sup>

Finally, designating MDTOs as FTOs could harm many American citizens that are consumers of MDTO’s products. Drug dealers and drug users in the United States would be exposed to prosecution under the FTO material support statutes.<sup>143</sup> Simply put, a designation would mean that almost all drug crimes would be transformed into terrorist crimes. Mexico’s Ambassador to the United States, Arturo Sarukhan, commented on the proposal to label MDTOs as FTOs with the following statement:

Misunderstanding the challenge we face leads to wrong policies and bad policy making. If you label these organizations as terrorists, you will have to start calling drug consumers in the U.S. ‘financiers of terrorist organizations’ and gun dealers ‘providers of material support to terrorists.’ Otherwise, you really sound as if you want to have your cake and eat it too.<sup>144</sup>

#### IV. SUGGESTIONS

##### *a. Correctly Defining the Threat.*

There are currently two separate national security threats emerging in Mexico. An effective solution requires an acknowledgement of the two distinct threats, and a comprehensive plan that seeks to address both of

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<sup>139</sup> *See Id.*

<sup>140</sup> Kan, *supra* note 76, at 138.

<sup>141</sup> *Id.*

<sup>142</sup> *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before H. Subcomm. on Oversight, Investigations, and Management*, 112<sup>th</sup> Cong. 49 (2011) (Statement of Brian Nichols), <http://www.danielhudsondefense.com/reports/DHS-war-against-drug-cartels.pdf>

<sup>143</sup> Carrie F. Cordero, *Breaking the Mexican Cartels: a Key Homeland Security Challenge for the Next Four Years*, 81 UMKC L. REV. 286, 308 (2012).

<sup>144</sup> Hesterman, *supra* note 44, at 159.

them. The first emerging threat, is the growth and expansion of MDTOs. Today, MDTOs “operate nearly seamlessly across borders in order to facilitate their operations in the most efficient manner possible.”<sup>145</sup> MDTO’s increased use of brutal tactics endanger the lives of Mexican nationals and American citizens, and contribute to the growing instability of Mexico and the United States’ Southwest border.<sup>146</sup> American lawmakers have acknowledged that the growth of MDTOs is now a direct threat to the national security of the United States.<sup>147</sup> The solution to this threat is not to enact new legislation, but to attack MDTO finances under the Kingpin Act. Blocking the finances of MDTOs will help United States security forces disrupt and dismantle these deadly organizations.

The second emerging national security threat in Mexico is the possibility of MDTO members providing support to FTOs. The globalization of the financial markets has provided MDTOs and FTOs opportunities to transact with one another.<sup>148</sup> Today, there are policymakers who claim that MDTOs and FTOs have formed a strategic alliance and work closely together.<sup>149</sup> While a strategic alliance is conceivable, there is no real evidence that it has actually been achieved.<sup>150</sup> “Although illicit markets have certainly become a point of contact for otherwise vastly different criminal group—one where political terrorism, theocratic ultra-nationalism, and narco-insurgency fund and equip each other—commerce and imitation do not make amalgamation.”<sup>151</sup> A potential transactional relationship between MDTOs and FTOs does not equate to a strategic alliance.<sup>152</sup> Strategic alliance or not, however, the possibility of a transactional relationship between MDTOs and FTOs warrants attention.<sup>153</sup> Accordingly, in order to prevent any transactional relationship from forming, and to ensure that MDTOs do not support FTOs, the United States needs to better enforce existing counterterrorism laws under Title 21 of the U.S. Code.

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<sup>145</sup> Gallagher, *supra* note 57, at 327.

<sup>146</sup> Curran, *supra* note 83, at 346-47.

<sup>147</sup> Gallagher, *supra* note 57, at 328.

<sup>148</sup> Hernandez, *supra* note 15, at 41.

<sup>149</sup> Lieutenant Colonel John F. Nolden, Mexican Drug Cartels and al Qaeda: Credible Link or Impracticable Alliance? 3 (Sept. 10, 2011) (Unpublished, Naval War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a555399.pdf>.

<sup>150</sup> Hernandez, *supra* note 15, at 52.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

*b. The Kingpin Act*

Policymakers like McCaul are right to worry about a potential threat, but wrong to seek to implement new legislation,<sup>154</sup> instead of effectively using existing laws, to address it. McCaul introduced legislation seeking to classify MDTOs as FTOs as a way for the United State's to limit MDTO's financial and property interests.<sup>155</sup> Although an FTO designation does impose substantial sanctions, the proposal fails to consider the financial sanctions that are already in place by the Treasury Department for drug trafficking under the Foreign Narcotics Kingpin Designation Act. The six MDTOs proposed for FTO designation by H.R. 1270 and H.R. 4303, are already being heavily sanctioned under the Kingpin Designation Act.<sup>156</sup>

On December 3, 1999, the President signed the Foreign Narcotics Kingpin Designation Act in order to apply economic and other financial sanctions to foreign narcotics traffickers and their organizations worldwide.<sup>157</sup> The Act is administered by the Department of the Treasury's Office of Foreign Assets Control.<sup>158</sup> Pursuant to the Act, the President, after consulting with various federal agencies, is required to submit to Congress an annual list identifying significant foreign narcotics traffickers.<sup>159</sup> The Kingpin Act also applies to foreign persons who are determined to be:

- (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person named pursuant to the Kingpin Act;
- (2) owned, controlled, directed by, or acting for or on behalf of, a person named pursuant to the Kingpin Act;
- or
- (3) playing a significant role in international narcotics trafficking.<sup>160</sup>

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<sup>154</sup> See H.R. 1270, 112th Cong. (2011); see also H.R. 4303, 112th Cong. (2012).

<sup>155</sup> Press Release, Congressman McCaul *supra* note 16.

<sup>156</sup> OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREASURY, DESIGNATIONS PURSUANT TO THE FOREIGN NARCOTICS KINGPIN DESIGNATION ACT, Jan. 7, 2016, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/narco\\_designations\\_kingpin.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/narco_designations_kingpin.pdf).

<sup>157</sup> OFFICE OF FOREIGN ASSETS CONTROL, DEP'T. OF TREASURY, NARCOTICS SANCTIONS PROGRAM, July 18, 2014, <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf>.

<sup>158</sup> *Id.*

<sup>159</sup> 21 U.S.C. §§ 1901-1908 (1999). 8 U.S.C § 1182 (2013).

<sup>160</sup> *Id.*

The Kingpin Act blocks the assets of the named foreign narcotics traffickers and foreign persons and prohibits U.S. persons from conducting financial transactions with them.<sup>161</sup>

Section 805(b) of the Kingpin Act blocks all property and interests in property within the United States, or within the possession or control of any U.S. person, which are owned or controlled by the significant foreign narcotics traffickers or foreign persons identified.<sup>162</sup> Penalties for violations of the act range from civil penalties of up to \$1.075 million per violation to more severe criminal penalties.<sup>163</sup> Since June 2000, more than 1,800 entities and individuals have been named pursuant to the Kingpin Act for their role in international narcotics trafficking.<sup>164</sup> The United States government has been using the Kingpin Act to cut off the money supply to dozens of MDTOs and their businesses. By compromising MDTO's financial network, the United States seeks to disable these powerful MDTOs and reduce the threat they pose.

In his testimony before the Senate Subcommittee on Financial Services and General Government, Secretary David Cohen explained that the Treasury Department had made significant progress in its efforts to target MDTOs.<sup>165</sup> He explained that “[t]he Kingpin Act aims to hit drug traffickers in their wallets, depriving them and their key lieutenants and money launderers of access to the U.S. financial system.”<sup>166</sup> More specifically, he spoke about how in 2013 the Department of treasury targeted the family members and close associates of the Sinaloa Cartel and the associates and businesses of Los Zetas.<sup>167</sup> David Cohen's testimony highlights the federal government's continued vigilance in its efforts to eradicate MDTOs and their illegal drug market in the United States.

The sanctions provided by the Kingpin act are a powerful way of reducing MDTO's ability to operate. The Deputy Assistant Secretary, Brian A. Nichols, described the Kingpin Act as an effective vehicle for going after MDTOs.<sup>168</sup> “It allows us to designate organizations and

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Press Release, Dep't of Treasury, Treasury Sanctions Mexican Newspaper Executive and Business Owner Tied to the Los Cuinis Drug Trafficking Organization (Dec. 16, 2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl0302.aspx>.

<sup>165</sup> Press Release, London Embassy of U.S., Testimony of Under Secretary Cohen before the Senate Subcommittee on Financial Services and General Government (April 2, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2341.aspx>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before H. Subcomm. on Oversight, Investigations, and Management*, 112<sup>th</sup>



individuals for freezing their assets, seizing their assets, prioritizing prosecutions, and it enjoys the full support and cooperation of the Mexican government.”<sup>169</sup> Nichols added, “[w]e do not believe that additional types of designation are necessary at this time.” He explained that the United States has already made “tremendous progress in going after [MDTO’s] assets, in targeting key individuals and bringing the full force of law enforcement upon them . . . .”<sup>170</sup> The testimony by Nichols highlights the progress of the Kingpin Act and proves that no additional designation is required to combat the threat presented by MDTOs.

*c. Title 21 of the U.S. Code*

As discussed above, the possibility of MDTO members aiding and supporting FTOs presents a major national security threat to the United States. Both bills, H.R. 1270 and H.R. 4303, introduced by McCaul seek to prevent any collaboration between MDTOs and FTOs. Although it is appropriate for policymakers like McCaul to seek to preempt any collaboration between the two dangerous organizations, there are laws already in place to prevent any future alliance.

While there have been a variety of isolated collaboration incidents involving FTOs and MDTOs, there still remains no real proof that the two organizations are working together. If MDTOs and FTOs have formed a commercial relationship, it would be an error to confuse this relationship with a strategic alliance.<sup>171</sup> “Although the possibility of such an alliance developing would be plausible, there is no conclusive evidence of it having been consummated.”<sup>172</sup> According to the 2014 Country Report on Terrorism, “[t]here were no known international terrorist organizations operating in Mexico, despite several erroneous press reports to the contrary during 2014.”<sup>173</sup> The report explains that al-Qaida and Hezbollah were not confirmed in the region, but that ideological sympathizers continue to provide financial and moral support to those and other terrorist groups.<sup>174</sup> The emerging threat in Mexico does not seem to be MDTOs working together with FTOs, but rather, lone Mexican drug traffickers and Mexican nationals providing aid to FTOs.

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Cong. 57 (2011) (Statement of Brian Nichols), <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72224/pdf/CHRG-112hhrg72224.pdf>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 49.

<sup>171</sup> Hernandez, *supra* note 15, at 52.

<sup>172</sup> *Id.*

<sup>173</sup> Press Release, U.S. Dep’t of State, Country Reports on Terrorism: Western Hemisphere Overview (2014), <http://www.state.gov/j/ct/rls/crt/2014/239409.htm>.

<sup>174</sup> *Id.*

Terrorist organizations like Hezbollah have been involved in money laundering operations in the Western Hemisphere for at least a decade.<sup>175</sup> With the large volumes of cash that MDTOs need laundered, it is natural for policymakers to speculate over the possibility of MDTOs and FTOs working together.<sup>176</sup> However, MDTOs have little interests in aligning themselves with terrorist groups.<sup>177</sup> “When terrorist organizations engage in criminal activity, it usually is fairly apparent that crime is used as a means to reach sociopolitical ends.”<sup>178</sup> The goals of these terrorist groups are ideological, and the criminal activities are normally conducted in order to finance these ideological goals.<sup>179</sup> In contrast, the goals of MDTOs are primarily economic, and a potential collaboration with hunted FTOs may be accompanied by unwanted attention.<sup>180</sup> MDTOs do not want to overthrow and replace the Mexican government, and they do not want to convert the Mexican people. MDTOs want to maximize their profits and keep the government and law enforcement out of their business.<sup>181</sup> Just because MDTOs are unlikely to work with FTOs at an operational level does not mean that the two groups do not have business interests with the potential to overlap.<sup>182</sup>

In response to the September 11, 2001 attacks, Congress enacted the 2001 Patriot Act.<sup>183</sup> The Act was reauthorized in 2005, and Congress introduced a Narco-Terrorism statute, 21 U.S.C. §960a, as part of the reauthorization.<sup>184</sup> “In short, §960a criminalizes the use of drug trafficking proceeds to finance a terrorist organization or terrorist activity and does not require any nexus to the United States.”<sup>185</sup> More specifically, the statute prohibits persons who have engaged in certain drug offenses from knowingly providing “anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism.”<sup>186</sup> “The statute casts a wide jurisdictional net,

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<sup>175</sup> SYLVIA LONGMIRE, *BORDER INSECURITY* 124 (Mac Millan) (2014).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 120.

<sup>178</sup> Flanigan, *supra* note 111, at 286.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Longmire, *supra* note 175, at 121.

<sup>183</sup> John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Reponses Threaten Out Civil Liberties?*, 66 WASH. & LEE L. REV. 1881, 1888 (2009).

<sup>184</sup> *Id.*

<sup>185</sup> Brian A. Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. U. L. REV. 1929, 1930 (2009).

<sup>186</sup> 21 U.S.C.A. 960a. (West).

allowing U.S. law enforcement to combat narco-terrorist activities throughout the world.”<sup>187</sup>

“21 USC §960a allows for prosecution of terrorist-related, extra-territorial drug offenses and provides DEA with a particularly powerful tool to prosecute, disrupt, and dismantle narco-terrorist groups worldwide.”<sup>188</sup> The statute gives the DEA jurisdiction to investigate cases internationally if there is an established link between a drug offense and terrorism.<sup>189</sup> In 2012, international drug dealer, Haji Baghcho, was sentenced to life in prison for conspiring to distribute heroin in the United States and using the proceeds of the distribution to support the Taliban.<sup>190</sup> The defendant was found guilty of violations of numerous narco-terrorism related charges, including §960a.<sup>191</sup>

As state sponsorship for terrorism continues to decline, FTOs will continue to seek new sources of funds for their terrorist activities.<sup>192</sup> MDTOs generate over \$40 billion annually, and the possibility of FTOs seeking funding from MDTOs needs to be considered.<sup>193</sup> “Drugs fuel terrorism and economically support the very organizations America has pledged to defeat.”<sup>194</sup> In order to prevent MDTO members from providing aid to FTOs, the United States’ agencies need to more effectively utilize §960a. Under §960a, the DEA can work closely with federal prosecutors to identify, investigate, indict and incarcerate any MDTO member who is providing assistance to an FTO.

## V. CONCLUSION

Narco-terrorism is one of the most dangerous national security threats immediately facing the United States today. Policymakers have proposed designating six MDTOs as FTOs as a solution to this threat. However, this solution mischaracterized the threat and fails to recognize helpful legislation already in place. Instead of designating MDTOs as FTOs, the United States needs to more effectively utilize existing narcotics trafficking regulations under the Kingpin Act, and

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<sup>187</sup> Lichter, *supra* note 185, at 1931.

<sup>188</sup> U.S. DEP’T OF JUSTICE, DRUG ENFORCEMENT AGENCY, FY 2014 PERFORMANCE BUDGET 8 (2014), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/16/dea-justification.pdf>

<sup>189</sup> 21 U.S.C.A 960a (West).

<sup>190</sup> United States v. Bagcho, No. CR 06-00334, 2015 WL 9216604, at \*1 (D.D.C. Dec. 17, 2015).

<sup>191</sup> *Id.*

<sup>192</sup> Thomas, *supra* note 183, at 1882.

<sup>193</sup> Longmire, *supra* note 175, at 120.

<sup>194</sup> Thomas, *supra* note 183, at 1882.

counterterrorism laws under Title 21 of the U.S. Code to combat this developing narco-terrorism threat.